U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

PATRICK CLEMENT, **ARB CASE NO. 02-025**

COMPLAINANT, **ALJ CASE NO. 01-STA-6**

v. **DATE: August 29, 2003**

MILWAUKEE TRANSPORT SERVICES, INC. ,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Patrick Clement*, pro se, Greenfield, Wisconsin*

For the Respondent:
Mary Pat Ninneman, Esq., Sean M. Scullen, Esq., ***Quarles & Brady LLP, Milwaukee, Wisconsin***

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105 (2000), and the implementing regulations found at 29 C.F.R. Part 1978 (2002). On August 4, 1999, Patrick N. Clement filed a complaint alleging that Milwaukee Transport Services (MTS) terminated him for engaging in STAA-protected activities. After a thorough review of the record, we conclude that MTS terminated Clement's employment for insubordination and not because he engaged in protected activity. Accordingly, we deny his complaint.

BACKGROUND

Beginning in 1975, MTS managed and operated the Milwaukee County Transit System (MCTS) pursuant to a contract with Milwaukee County. Transcript (T.) at 118, 405. Clement began working for MTS on February 10, 1992. Clement held a commercial driver's license with

a "P" (passenger) endorsement and worked at MTS as a full-time regular bus operator. Complainant's Exhibit (CX) 2; T. at 108. At times relevant to this action, he began his workday at MTS's Kinnickinnic Station, one of three operating stations where drivers retrieved buses that are used to provide transportation service to the public. T. at 233-234.

MCTS buses were equipped with vehicular hazard warning lights, also known as "four-way flashers." MTS's company rules required bus operators to activate the four-way flashers only to alert MTS supervisors, its security force, and local police in the event of an emergency. T. at 402-403; CX 6 (Operator's Manual, Section 3.16) ("Four way flashers are not to be used on a disabled bus except on the freeway or when police assistance is required."); CX 16 (MTS Special Bulletin, issued June 23, 1998) ("4-Way Flashers are to be used ONLY in emergency situations when assistance is needed. [sic] NOT during boarding or alighting situations.").

MTS informed Clement of this policy when it first hired him. T. at 88. Although he understood the policy, Clement believed that there were other circumstances when the flashers should be activated, such as boarding and discharging passengers. He thought that the Federal Motor Carrier Safety Regulations (FMCSR), specifically 49 C.F.R. § 392.22(a),[1] required drivers to use four-way flashers when a bus made a stop "in a lane of traffic or adjacent to the traveled portion of the highway for all stops other than normal traffic stops." CX 2 at 21-22.

Clement had a number of disputes with route supervisors regarding his use of the flashers. He received verbal and written warnings for his disregard of MTS's flasher policy. T. at 131; CX 18, 24. Clement's interpretation of the regulation caused problems because MTS route supervisors understood the activation of four-way flashers as a request for assistance. T. at 317-318. At one point, the police department in West Allis, Wisconsin contacted Michael Vebber, MTS's Director of Operations, and told him that a bus had been traveling through West Allis on several occasions with its four-way flashers activated, but when the police responded, they found there were no emergencies. T. at 403. The police department informed MTS that, if

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[1] The section states:

> Whenever a commercial motor vehicle is stopped upon the traveled portion of a highway or the shoulder of a highway for any cause other than necessary traffic stops, the driver of the stopped commercial motor vehicle shall immediately activate the vehicular hazard warning signal flashers and continue the flashing until the driver places the warning devices required by paragraph (b) of this section. The flashing signals shall be used during the time the warning devices are picked up for storage before movement of the commercial motor vehicle. The flashing lights may be used at other times while a commercial motor vehicle is stopped in addition to, but not in lieu of, the warning devices required by paragraph (b) of this section.

49 C.F.R. § 392.22(a).

such conduct continued, they would discontinue responding to buses driving through their municipality with their flashers activated. T. at 404.

During his employment with MTS, Clement complained about other driver safety matters. On July 3, 1997, he sent letters to the Milwaukee County Board and local television stations alleging that MTS knowingly violated federal and state laws regarding safety issues. CX 10. On July 8, 1997, Clement contended that MTS assigned him overtime work in violation of the FMCSR's "hours of service" rules, specifically 49 C.F.R. § 395.3(a)(1). T. at 349, CX 25.

On July 30, 1997, Clement filed a STAA complaint[2] with the Occupational Safety and Health Administration (OSHA) alleging, among other infractions, that MTS "gave him a written warning on July 23, 1997, for voicing and/or filing written safety concerns in regards to potential violations of the Federal Motor Carrier Safety Standards." CX 3. On July 13, 1998, Clement and MTS resolved this complaint pursuant to a settlement agreement. One of the provisions of the agreement states that MTS "agrees that it will not discharge or in any manner discriminate against any of its employees due to any employee's exercise of any rights protected under the [STAA]." CX 3.

On October 26, 1998, the MILWAUKEE JOURNAL SENTINEL published a newspaper article in which Clement accused MTS of forcing him to drive over an unsafe viaduct. CX 13.

November 20, 1998

On November 20, 1998, Clement's bus was parked in the vicinity of the North Richards Street and East Capitol Drive layover. Michael Mullihan, Kinnickinnic Station Supervisor, testified that, according to Andy Bowers,[3] an MTS route supervisor, Clement's bus was south of the bus stop "by some distance," a status described as "out of layover." T. at 317. Clement testified that he was parked within the layover. T. at 214. The bus also had its four-way flashers activated. T. at 141. According to Bowers, Clement observed Bowers approaching the bus, started the engine, and drove away. Respondent's Exhibit (RX) F.

Bowers caught up to the bus at its next stop and went up to the driver's side window. RX V. Clement opened the window but did not indicate that there was any emergency requiring the use of the flashers. Bowers told Clement that pulling away from a supervisor was grounds for removal from duty. T. at 219, 318. According to Joseph McGinty, MTS's Division Manager, Clement said the words "don't threaten me" and then closed the window while Bowers was still standing there. T. at 318; RX V. Clement contends that he closed the window only after Bowers walked away. T. at 221; RX F. Bowers then crossed the front of the bus, boarded it, and told Clement he was being taken off the bus. T. at 221, 318.

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[2] Clement alleges that he initiated three complaints against MTS. T. at 117. The record before us does not support this contention.

[3] Bowers did not testify in this matter.

On November 23, 1998, Clement was issued a 3-day suspension for insubordinate conduct toward a route supervisor in violation of MCTS's Rules and Regulations for Bus Operators. T. at 315-316, 320; RX B, D.

February 4, 1999

On February 3, 1999, Clement activated his four-way flashers while at a bus stop during a non-emergency situation. T. at 157; RX J. On the morning of February 4, 1999, Vebber instructed Mullihan to give Clement a final written warning. T. at 321. Mullihan contacted McGinty, who then scheduled a meeting for the sole purpose of issuing Clement a final warning in connection with his unauthorized use of the flashers. T. at 321. McGinty also received a call from Lloyd Perkins, President of the Amalgamated Transit Union's Local 998 (the Union), informing him that Rick Bassler, a Union representative, would attend the meeting.

Clement was scheduled to drive two routes on February 4, 1999. His morning route ended at 9:04 a.m., and he was scheduled for an afternoon route that would have begun at 1:27 p.m. T. at 68. Mullihan posted Clement's badge number behind the clerk's glass sometime between the end of his first shift and start of his second. This was MTS's standard procedure for informing operators that they needed to see a MTS supervisor. T. at 322-23, 357.

Clement returned to the station at 1:27 p.m. to start his afternoon route. Chuck Ciardo, a station clerk, told Clement to see McGinty. T. at 51-52. Mullihan observed Clement walking past the window to McGinty's office and told Clement about the meeting and that a Union representative was on the way. RX A. Clement told Mullihan that he had work to perform and could not attend a meeting. McGinty overheard this comment and told Clement his work had been reassigned. Clement responded by stating, "[i]f I don't have any work, guess I'll go home." CX 2 at 20. Clement began walking away but was followed by McGinty who, while about five feet behind Clement, told him if he left he would charged with insubordination. RX I, J.

Clement continued walking toward a table to retrieve items that he brought to work. McGinty went to the edge of the table and, facing Clement, told him "again if you leave, it'll be insubordination." T. at 431. Other MTS employees present in the area were engaged in conversation, but as soon as McGinty told Clement to come back, those people stopped talking. T. at 326. Clement turned around without saying anything and walked out into a hallway leading to an exit door. T. at 371. Clement then went to the Union office. T. at 207.

McGinty told the front counter clerk to instruct the person working Clement's afternoon route to finish it. McGinty then went into the board room and informed another clerk to place Clement "on suspension to my office for insubordination and not to assign any work until further notice." RX G. McGinty returned to his office where Mullihan and Bassler were waiting; Bassler indicated that he was waiting for Clement. McGinty and Mullihan told Bassler about Clement's departure and stated that Clement's actions were insubordinate. RX G.

Bassler went to the Union office, where he encountered Clement. Bassler called McGinty and told him that Clement was in the Union office and they both wanted to return to McGinty's office. McGinty indicated that he would receive them. T. at 280.

Clement and Bassler returned to the station and met with McGinty and Mullihan. Bassler stated that they should discuss Clement's decision to leave the station, but McGinty informed them that they needed to first discuss the flasher reprimand. T. at 247-48. Mullihan then proceeded to inform Clement that MTS would no longer tolerate his improper use of four-way flashers and that progressive discipline would apply to future violations. Clement admitted that Mullihan stated: "You don't use your flashers when you're driving. You only use them when you've got a problem on the bus. They're only for when we've got a fight or a fare dispute. You don't use them when you're making stops." T. at 160. Mullihan then handed Clement a written warning. T. at 328-330.

McGinty then proceeded to discuss "the chain of events that occurred earlier in the station." T. 330. Bassler stated that Clement should not be suspended for insubordination because he eventually returned to the station. T. at 249. McGinty nevertheless terminated Clement's employment for insubordination. McGinty prepared a Record of Disciplinary Action form in which he wrote, "[i]n view of your overall work record, including disregard for Company policy, disregard for management authority and insubordination, you are hereby notified that you are discharged, effective February 4, 1999." RX A.

Clement grieved the three-day suspension and his discharge under the grievance procedure provided by MTS's Labor Agreement with the Union. RX N-P, T. at 250-251. MTS denied Clement's grievances, and the Union declined to take either grievance to arbitration. T. at 399, 402.

Case history

On August 4, 1999, Clement filed the complaint that is the subject of this case. In his complaint and accompanying documents, Clement alleged that the termination of his employment was the result of his compliance with the FMCSR and state laws pertaining to motor carrier safety. After an investigation, OSHA concluded on September 29, 2000 that MTS did not violate the STAA. Clement appealed the determination and requested a hearing before an ALJ. An ALJ conducted a hearing on February 13-14 and March 13, 2001.

On November 29, 2001, the ALJ issued a Recommended Decision and Order (R. D. & O.) recommending that Clement's case be dismissed. The ALJ found that Clement failed to "establish by a preponderance of the evidence that either the final warning on the use of the flashers, or his termination for insubordination, was for reasons protected by the STAA." R. D. & O. at 44-45.

Clement now appeals the ALJ's ruling to this Board.[4]

[4] Clement also alleges that the ALJ did not conduct a fair hearing. Complainant's Brief at 27. The record does not support this contention.

ISSUE

The issue before us is whether Clement's employment was terminated because he engaged in protected activity.[5]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor's jurisdiction to decide this matter by authority of 49 U.S.C. § 31105(b)(2)(C) has been delegated to the ARB. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c)(2002).

When reviewing STAA cases, the ARB is bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3). *See BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C. § 557(b). Therefore, the Board reviews the ALJ's conclusions of law de novo. *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

1. Governing Law

The STAA protects operators of commercial motor vehicles and provides, in pertinent part:

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[5] On appeal to the Board, Clement alleges that MTS, in violation of the Fair Labor Standards Act (FLSA), engaged in a practice of not paying its employees for attending company meetings. Complainant's Brief at 11. First, we note again that Clement filed his complaint pursuant to the STAA. Any matters relating to FLSA claims are beyond the scope of this proceeding. Second, the record establishes that MTS employees were in fact paid for meetings. T. at 392, 496-497; RX S ("The company pays employees for attendance at mandatory meetings in accordance with the terms of the General Labor Agreement.").

> (a) Prohibitions. (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because –
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> > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> >
> > (B) the employee refuses to operate a vehicle because –
> >
> > > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> > >
> > > (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. §31105(a). Subsections (1)(A) and (1)(B) of the foregoing provision are referred to as the "complaint" clause and the "refusal to drive" clause, respectively. *See LaRosa v. Barcelo Plant Growers, Inc.*, ARB No. 96-089, ALJ No. 96-STA-10, slip op. at 1-3 (ARB Aug. 6, 1996). At issue here is subsection (1)(A), since it is not alleged that Clement refused to drive.

Under the burdens of proof and production in STAA proceedings, a complainant must first make a prima facie showing that protected activity motivated the respondent's decision to subject the complainant to adverse employment action. The respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. *See, e.g., Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 98-STA-8, slip op. at 7 (ARB July 28, 1999) citing *Clean Harbors Envtl. Svcs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) and *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).

When the respondent presents evidence of a nondiscriminatory reason for adverse employment action, the burden shifts to the complainant to prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a pretext for discrimination. *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002), citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In proving that a respondent's asserted reason for adverse action is pretextual, the employee must prove not only that the respondent's asserted reason is false, but also that discrimination was the true reason for the adverse action. At all times the complainant bears the ultimate burden of persuading the trier of fact that the employer discriminated against him. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

2. Protected Activity

Clement engaged in protected activity pursuant to subsection (1)(A) of the STAA when he filed his July 30, 1997 complaint with OSHA. 49 U.S.C. §31105(a)(1)(A); *see* R. D. & O. at 6, n.6. He also engaged in protected activity when he complained to MTS and county officials about alleged hours of service violations. CX 10, 25. *See, e.g., Moravec v. HC & M Transp., Inc.*, 1990-STA-44 (Sec'y July 11, 1991).

We make no finding with respect to whether Clement's complaints about MTS's four-way flasher policy constituted protected activity. However, even assuming that Clement's complaints are protected under the STAA, we conclude that MTS terminated Clement for a legitimate, non-discriminatory reason, namely ignoring his supervisor's commands on November 20, 1998, and December 4, 1999.

3. Termination for Insubordination

Even if Clement engaged in protected activity while employed at MTS, his termination was the result of his insubordinate acts on November 20, 1998 and February 4, 1999.[6] A complainant is not automatically immune to adverse action subsequent to engaging in protected activity. Even if an employee engages in protected activity, an employer may discipline the employee for insubordination. *See, e.g., Logan v. United Parcel Serv.*, 96-STA-2 (ARB Dec. 19, 1996); *Schulman v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 99-015, ALJ No. 98-STA-24 (ARB Oct. 18, 1999); *Adjiri v. Emory Univ.*, 97-ERA-36 (ARB July 14, 1998).

The aforementioned Rules and Regulations for Bus Operators describe the penalties for insubordination. Rule 14 provides that a bus operator may be discharged or suspended for a first act of insubordination and that the bus operator may be discharged for a second act of insubordination. RX B.

The record indicates that the insubordinate acts for which Clement was fired were neither his complaints about MTS flasher policy nor his use of the flashers in violation of that policy. On November 20, 1998, Clement was observed using his flashers, but his act of insubordination was ignoring Bowers. On February 4, 1999, he was instructed to attend a meeting about his use

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[6] The ALJ received evidence and testimony on the issue of whether Clement suffered a hearing impairment and therefore may not have heard the commands of Bowers and McGinty. Absent an allegation that Bowers and McGinty were aware of such impairment, Clement's argument that he did not hear them is irrelevant to his whistleblower claim because Bowers and McGinty reasonably believed Clement was being insubordinate. An employer's discharge decision is not unlawful if it is based on a mistaken conclusion about the facts; the decision must be motivated by retaliation. *Dysert v. Westinghouse Electric Corp.*, 1986-ERA-39, slip op. at 3 (Sec'y Oct. 30, 1991) (under Energy Reorganization Act), citing *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 191 (1st Cir. 1990); *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989), and *Jeffries v. Harris County Cmty. Action Assoc.*, 615 F.2d 1025, 1036 (5th Cir. 1980).

of the flashers, but his insubordinate act was his refusal to remain at the station despite McGinty's command.[7] Once Clement walked away McGinty decided that, even if Clement returned for meeting and agreed to comply with the flasher policy, Clement would be discharged for insubordination. T. at 309.

We also conclude that Clement has not met his burden of proving that MTS's explanation for his termination was pretextual. In his grievance proceeding Clement presented the names of ten MTS employees whom he alleges were insubordinate but not subjected to discipline. RX P. However, he has not provided any evidence in these proceedings to support this list. Clement offered only the testimony of Ramon Rivera, another MTS driver, to prove that other MTS employees engaged in insubordinate behavior but were not reprimanded for their actions. T. at 75-98. Rivera testified about his displeasure with a vacation selection process and a related outburst, but his actions were not insubordinate. We therefore conclude that Clement has not met his burden of proving that MTS's explanation for his termination is pretextual.

CONCLUSION

After a thorough review of the record, we conclude that MTS did not terminate Clement's employment because he engaged in protected activity. Although Clement engaged in protected activity while he was employed by MTS, termination of his employment was the result of his insubordinate actions on November 20, 1998 and February 4, 1999. He has therefore failed to meet his burden of establishing that MTS discriminated against him because he engaged in protected activity.

We accept the ALJ's recommendation and therefore **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[7] Clement walked away despite being told by Mullihan that a Union representative would be present at the meeting. RX A.